1989

Roland Webb v. R.O.A. General Inc., William Reagan, and WIlliam Adams, Esq., and Douglast T. Hall Esq. : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ROLAND WEBB, Plaintiff-Respondent, vs. R.O.A. GENERAL, INC., a Utah corporation, WILLIAM REAGAN, individually, and WILLIAM ADAMS, ESQ., individually, and DOUGLAS T. HALL, ESQ., individually, Defendants-Appellants	No. 890170-CA Category 14(b)

BRIEF OF APPELLANTS

On Appeal From the Judgment of the
Third Judicial District District for
Salt Lake County, State of Utah

Honorable James S. Sawaya, Judge

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JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction lies with this Court pursuant to Utah Code Ann. §78-2a-3(2)(j) (Supp. 1989). This appeal is taken from the final order entered by the Third Judicial District Court of Salt Lake County, the Honorable James S. Sawaya presiding, granting plaintiff-respondent's motion for partial summary judgment on the first cause of action of his amended complaint.

STATEMENT OF ISSUES

1. Did the trial court err in failing to find genuine issues of material fact existed as to whether plaintiff-respondent fully performed his contractual duties under the parties' agreement?

2. Did the trial err in failing to find genuine issues of material fact existed as to whether the parties' agreement

completely and accurately reflected the intention of the parties at the time they entered into the subject agreement?

3. Did the trial court err in failing to find genuine issues of material fact existed as to whether plaintiff-respondent had waived his right to rely on the terms of the agreement as set forth in the written contract between the parties?

DETERMINATIVE AUTHORITIES

Rule 56 of the Utah Rules of Civil Procedure is determinative. Due to the length of this rule, the text is set forth in the addendum.

STATEMENT OF THE CASE

On or about July 7, 1981, plaintiff-respondent, Roland Webb, and defendant-appellant William K. Reagan formed defendant-appellant R.O.A., a Utah corporation. (R. 689-90). With the formation of R.O.A., Galaxy Outdoor Advertising, Inc., a company in which Webb was a majority stockholder, was merged into R.O.A. Pursuant to the parties' agreement, Reagan obtained 80% of the stock in R.O.A. and Webb and his wife acquired the remaining 20% of the stock in R.O.A. (Id.)

In conjunction with the parties' formation of R.O.A., the parties agreed on an employment contract for Webb. The employment contract required Webb to devote his "best efforts, skill, and experience in connection with his employment" to R.O.A. (R. 48-52, 695-97). See Addendum at pp. 3-7.

Notwithstanding the parties' agreement requiring Webb to devote his best efforts in connection with his employment to

R.O.A., the record before the trial court contained substantial evidence that Webb had breached his employment contract with R.O.A. In his deposition of September 6, 1988, Webb testified as follows:

> (By Mr. Fishler) How many hours a week would you say you're putting in?
>
> Mr. Anderson: For whom?
>
> Q. (By Mr. Fishler) For R.O.A., pursuant to the contract.
>
> * * *
>
> Mr. Fishler: Talking in percentages of time?
>
> * * *
>
> Mr. Fishler: To the first deposition, okay. What I'm asking him is how many hours he was putting in.
>
> Q. Are we talking 20 hours, 40 hours?
>
> A. Are you talking a week?
>
> Q. A week, yes.
>
> A. For the first year I would guess at least 35 to 40 hours.
>
> * * *
>
> Q. In 1983 how many hours a week did you put in on the average?
>
> A. I would guess probably 35.
>
> Q. In 1984 on the average per week?
>
> A. At least 30, possibly -- I think 30 would be a realistic --
>
> Q. In 1985?

A. Probably 25.

Q. In '86?

A. About the same amount. I didn't change much.

(R. 1025 at pp. 35-37).

Furthermore, Webb admitted in his deposition that he spent considerable amounts of time working on his own advertising projects while employed by R.O.A. (R. 1022 at p. 18). Webb estimated that during the period of 1983 to 1986, he spent only about 80% of his time on behalf of R.O.A. (R. 1025 at p. 48-53).

Others personally acquainted with Webb observed that he was frequently out of the office, frequently handled only private matters during company time, and frequently was not involved in the day-to-day operations of R.O.A. (R. 868-69).

In addition, the trial court had before it evidence that Webb had failed to perform at least two tasks required of him by the president of R.O.A., William K. Reagan. (R. 881-84).

Webb's contracted employment to R.O.A. also included two provisions dealing directly with his compensation:

> 4. Compensation. As compensation for the services required to be performed by him hereunder, the Employee shall receive a basic salary of $100,000 per annum, payable monthly.
>
> 5. Additional Compensation. The Employee shall be entitled to receive additional compensation annually equal to one percent (1%) of annual net sales of outdoor advertising of the company.

(R. 695).

There was considerable evidence before the trial court

that both R.O.A. and Webb intended and agreed that compensation under the 1% gross sales provision, i.e., paragraph 5 of the employment contract, would be due and payable only at such time as R.O.A. had sufficient funds to make payments under the provision. (R. 876-78, 881-84). In addition, evidence was produced that R.O.A. and Webb intended and agreed that Webb's "basic salary" of $100,000 per annum was to be paid in $85,000 cash per year, plus $15,000 in "trades." (Id.; R. 51, 52). R.O.A. presented evidence that pursuant to the parties' employment contract, from 1981 to 1986, Webb had received at least $332,608.54 in cash and $15,241.18 in reported trades. (R. 878). Webb, on the other hand, contended that he had received only $334,447.00 in cash and trades pursuant to the contract. (R. 702).

Prior to January 11, 1985, R.O.A. experienced severe financial difficulties. At that time, R.O.A. agreed through its board of directors, of which Roland Webb was a member, to obtain a loan from Massachusetts Mutual which included a restriction limiting the total annual salary of Roland Webb to $105,000. (R. 881-84). During the term of Webb's employment to R.O.A. from August 1, 1981 until August 1, 1986, R.O.A. never had sufficient funds to pay Webb or William K. Reagan under the gross sales provision of their respective employment contracts. (Id. 881-84).

On or about May 28, 1987, Webb filed the instant action in the Third Judicial District Court of Salt Lake County, alleging several causes of action against defendants-appellants, including a claim that R.O.A. had breached their employment contract. (R.

2-20, 33-78). R.O.A. answered Webb's complaint, denying that it had breached the employment contract, and asserting that R.O.A.'s performance under the contract was excused due to Webb's nonperformance. (R. 202-72).

On or about August 4, 1988, Webb moved the trial court for partial summary judgment against defendant-appellant R.O.A. on count one of his amended complaint, claiming that he was entitled to a judgment as a matter of law for the sum of $342,747.00 for R.O.A.'s breach of the employment contract. (R. 810-12). Oral argument on the motion was heard before the Honorable James S. Sawaya, District Judge, on or about November 7, 1988. Judge Sawaya issued a minute entry on or about November 9, 1988, finding that Webb was entitled to judgment as a matter of law for R.O.A.'s breach of the employment agreement. (R. 937-38). The order granting Webb's motion for partial summary judgment in the amount of $342,747.00, and certifying the same as final under Rule 54(b) of the Utah Rules of Civil Procedure was entered on or about January 5, 1989. (R. 966-68).

SUMMARY OF ARGUMENT

The trial court erred in failing to find that genuine issues of material fact existed that precluded the entry of partial summary judgment in favor of Webb on his first cause of action. The evidence before the trial court demonstrated the existence of substantial issues as to whether Webb had fully performed his duties and obligations under the employment contract, whether the written contract fully and accurately

reflected the parties' intentions, and whether Webb waived his right to rely on the contract, as written. Due to the existence of genuine issues of material fact, this court should reverse and remand the actions of the trial court.

ARGUMENT

POINT I.

GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER WEBB FULLY PERFORMED HIS CONTRACTUAL DUTIES.

A motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure must establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960). In addition, the contentions of the party opposing the motion must be considered in a light most advantageous to him and all doubts must be resolved in favor of permitting the matter to be submitted to the trier of fact. Controlled Receivables, Inc. v. Harmen, 17 Utah 2d 420, 413 P.2d 807 (1966). In considering a motion for summary judgment, it is inappropriate for a trial court to consider the weight of disputed evidence or the credibility of witnesses; the sole inquiry to be determined is whether there is a material issue of fact to be decided. Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304 (Utah 1987). On appeal, this Court's standard in reviewing the trial court's ruling on Webb's motion for summary judgment is identical to that standard used by the trial courts. Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750 (Utah Ct.App. 1988).

Plaintiff brought suit against R.O.A. claiming that he had fully performed the provisions of his employment contract with R.O.A. R.O.A., in turn, answered his amended complaint by asserting that its performance under the contract was excused, in whole or in part, due to Webb's own breach of the employment contract. The determination of whether a contract has been breached is ordinarily a question for the trier of fact to determine from the facts and circumstances. 17 Am.Jur.2d Contracts §355 (1964).

The Utah Supreme Court recognized in Heywood v. Ogden Motor Car Co., 7 Utah 417, 266 P.2d 1040 (1928), that the determination of whether a breach of contract has occurred is ordinarily a question of fact. In Heywood, the plaintiff brought suit for past due rents under a lease agreement, and for other damages resulting from the defendant's alleged breach of the lease agreement. Defendant counterclaimed, alleging it was entitled to a setoff under the contract due to the plaintiff's alleged breach of the lease. Defendant asserted that it had been deprived of the use of the lease premises during a portion of the lease. Plaintiff, on the other hand, presented evidence that the defendant had accepted the keys to the premises on the day the lease was to begin. At the conclusion of all the evidence, the trial court found that the defendant's acceptance of the keys constituted constructive possession of the premises, and instructed the jury that the defendant was not entitled to recover anything by way of a setoff. The trial court also instructed the

jury to enter a verdict in favor of the plaintiff on the breach of contract claim.

The Utah Supreme Court, in reversing and remanding the matter for a new trial, found that the evidence of a mutual breach of contract was in sufficient conflict so as to create genuine issues of material fact thereby precluding a summary determination of liability under the lease agreement.

The evidence before the trial court in the instant action clearly established that genuine issues of material fact exist in this case. Questions of fact as to whether either or both the parties breached the employment contract, whether any such breaches were material, i.e., whether such breach excused either party's performance under the contract, and what damages, if any, were sustained by Webb as a result of any breach by R.O.A.

The Utah Supreme Court in Lowe v. Rosenlof, 12 Utah 2d 190, 364 P.2d 418 (1961), recognized that a party suing for breach of contract must establish his own performance under the contract as a condition precedent to the entry of judgment in his favor. In Lowe, the plaintiff contractor brought suit to recover monies allegedly due under a subcontract with the defendant. Plaintiff was hired to do concrete work on a school project. After more than 70% of the concrete work was done, defendant took the job over from plaintiff. Plaintiff then brought suit, alleging that he was forced off the job and not allowed to complete it. The defendant claimed that the plaintiff had abandoned the job due to his precarious financial condition. In discussing the plaintiff's

burden of proof at trial, the Utah Supreme Court stated:

> It is an elementary principle of the law of contracts that in order to recover upon a contract, [a party] . . . must first establish his own performance or a valid excuse for his failure to perform.

Lowe, 364 P.2d at 421 (quoting Miller v. Young, 197 Okla. 503, 172 P.2d 994, 995 (1946). Likewise, in Malot v. Hadley, 86 Or.App. 687, 740 P.2d 804, 805-06 (1987), the court stated:

> [A] party to a contract who alleges that the other party has breached must prove performance of the party's own obligations under the contract or demonstrate a valid tender of performance that was rejected.

See also, Holland Development, Ltd. v. Manufacturers Consultant, Inc., 81 Or.App. 57, 724 P.2d 844, 849 (1986).

Once R.O.A. produced evidence tending to show that Webb breached his duties under the employment contract, it was highly inappropriate for the trial court to grant summary judgment in favor of Webb. The determination of the materiality of Webb's alleged breach must be submitted to the trier of fact. See State v. Scott, 59 Or.App. 25, 650 P.2d 158 (1982); Restatement (Second) of Contracts §§241 and 242 (1981). Only after the materiality of Webb's alleged breach has been determined by a trier of fact can there be a determination of whether R.O.A.'s duties under the employment contract were discharged, either in whole or in part.

The determination of the materiality of Webb's alleged breach furthermore affects the resolution of the issue of damages in the instant case. The trial court had before it a genuine issue of material fact as to the amount of compensation Webb

actually received under the employment contract. (R. 702, 878). Due to the existence of such a conflict, the trial court erred in entering judgment as a matter of law in favor of Webb in the amount of $342,747.00.

POINT II.

GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE WRITTEN CONTRACT FULLY OR ACCURATELY REFLECTS THE INTENTION OF THE PARTIES.

While as a general rule, the terms of a written contract cannot be varied by parol evidence, "the parol evidence rule as a principle of contract interpretation has a very narrow application." Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985). The Utah Supreme Court recognized in Union Bank that the parol evidence rule has no application to a non-integrated contract, i.e., a written contract was not intended by the parties to reflect the entire agreement. R.O.A. demonstrated that the R.O.A. and Webb did not intend the written contract of employment to encompass or incorporate the entire agreement between them. The written contract merely states that Webb's "basic salary" is to be $100,000 per annum. There is no indication what portion of that salary is to be paid in cash or trades. However, R.O.A. produced evidence demonstrating that the parties clearly intended that the salary would be divided between cash payments and items received in trade from R.O.A.'s clients. In addition, the trial court had evidence before it that the written contract did not incorporate the condition, clearly understood and agreed upon by the parties, that R.O.A. must turn a profit and have sufficient

cash available to it before the 1% gross sales provision could be paid to Webb.

The parol evidence rule likewise did not preclude R.O.A. from introducting evidence of the negotiations leading up to the eventual formation of the employment contract, especially where such evidence shows that the executed written contract does not state accurately the intention of the parties. See, Brean v. North Campbell Professional Building, 26 Ariz.App. 381, 548 P.2d 1193, 1196 (1976).

In Union Bank, the Utah Supreme Court also noted that the parol evidence rule does not bar parol evidence of the circumstances under which a contract is negotiated and executed. In Union Bank, defendants, Ronald and Marjorie Swenson, executed a promissory note in favor of plaintiff bank. The Swensons signed the note "individually and personally." Ronald Swenson also signed the note in his capacity as president of State Lumber, Inc. Upon default on the note, plaintiff brought suit against State Lumber and the Swensons in their individual capacity. The Swensons contested their personal liability.

The Swensons submitted affidavits to that effect in opposition to the plaintiff's motion. The trial court, applying the parol evidence rule, found no genuine issue of material fact and granted summary judgment in favor of plaintiff, and the Swensons appealed.

On appeal, the Utah Supreme Court reversed the trial court's ruling. In so ruling, the Court held:

> The parol evidence rule as a principle of contract interpretation has a very narrow application. Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract. Therefore, a court must first determine whether the writing was intended by the parties to be an integration. In resolving this preliminary question of fact, parol evidence, indeed, any relevant evidence is admissible.
>
> Parol evidence is admissible to show the circumstances under which the contract was made or the purpose for which the writing was executed. This is so even after the writing is determined to be an integrated contract. Admitting parol evidence in such circumstances avoids the judicial enforcement of a writing that appears to be a binding integration but in fact is not.
>
> > What appears to be a complete and binding integrated agreement may be a forgery, a joke, a sham, or an agreement without consideration, or it may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing.
>
> Restatement (Second) of Contracts, §214, Comment C (1981).
>
> * * *
>
> Protection against judicial enforcement of writings that appear to be binding integrations but in fact are not lies in the provision that all relevant evidence is admissible on the threshold issue of whether the writing was adopted by the parties as an integration of their agreement. This appears to be so even if the writing clearly states it to be a complete and final statement of the parties' agreement.

Id. at 665. In remanding the matter to the trial court, the Court

held that the Swensons' affidavits raised genuine issues of material fact as to whether the parties assented to the written contract as a final statement of their intended agreement or whether the parties executed it for some other reason or purpose. Id. at 666.

The Utah Supreme Court in Colonial Leasing Co. v. Larsen Brothers Constr. Co., 731 P.2d 483 (Utah 1983), also held that the issue of whether a contract is integrated and reflects the parties' intent involves inherent questions of fact that must be decided by the trier of fact. In Colonial Leasing, the plaintiff leasing company transferred possession of a piece of heavy construction equipment to defendant pursuant to a document called a "lease." When defendant defaulted on the payments required by that document, plaintiff sued for damages. The "lease" contained an integration clause and expressly required return of the equipment upon expiration of the lease term. Plaintiff moved for summary judgment.

Defendant's affidavits in opposition to summary judgment stated that it was the trade, custom and usage in the business to accord lessees an option to purchase leased equipment at the end of the lease and that plaintiff had orally granted defendant an option to purchase the equipment at the end of the lease period. Defendant contended that the agreement was a contract to purchase, rather than a lease. The trial court held that the parol evidence regarding an option to buy the equipment was inadmissible, and granted the plaintiff's motion for summary judgment.

Upon appeal, the Utah Supreme Court reversed and remanded the case, holding that the affidavits submitted by the defendant created an issue of fact on "whether the purported lease was an integrated writing." Id. at 487. The Court also noted that parol evidence is admissible "where the character of the written agreement itself is ambiguous even though its specific terms are not ambiguous." Id. The court found that under circumstances such as those presented in the instant appeal, a trial court should be reticent to grant summary judgment:

> Only when contract terms are complete, clear, and unambiguous can they be interpreted by a judge on a motion for summary judgment. If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is to be determined by the jury. In sum, whether a lease was intended as security for a sale is a question to be determined on the facts of each case, as is the issue of whether the nature of the document raises questions of fact that preclude summary judgment.

Id. at 488 (emphasis added).

The evidence produced by R.O.A. in opposition to the plaintiff's motion for partial summary judgment established that the written employment contract did not represent the entire agreement between the parties, nor did the written contract accurately reflect the parties' intentions. Evidence of the parties' prior agreements and negotiations are admissible because the contract is not a fully integrated document. Such evidence likewise assists the trier of fact in understanding the meaning of the terms used in the written contract. See, Restatement (Second) of Contracts, §214(c) (1981). Such evidence was also relevant to

show that the parties omitted pertinent portions of the terms of the employment contract, including the omission of a condition precedent to R.O.A.'s duty to pay the 1% gross sales compensation. See, Restatement (Second) of Contracts, §§216 and 217 (1981). Due to the existence of genuine issues of material fact as to the integrated nature of Webb's employment contract and the parties' intentions in entering into the agreement, this Court should reverse and remand the trial court's entry of partial summary judgment in favor of Webb.

POINT III.

GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER WEBB WAIVED HIS RIGHT TO RELY ON THE TERMS OF THE WRITTEN CONTRACT.

Parol evidence is also clearly admissible in the instant case to show a subsequent waiver of an express contractual provision. Linear v. Standard Hardware Co., 423 So.2d 966 (Fla. Dist.Ct.App. 1982); Pipe Industry Fund Trust v. Consolidated Pipes Trades Trust, 760 P.2d 711 (Mont. 1988); Glenmark Associates v. Americare of West Virginia, Inc., 371 S.E.2d 353, 356 (W.V. 1988). Such a waiver may be shown by agreement of the parties, parol evidence, or the parties' course of conduct. First Capitol Mortgage Corp. v. Talandis Corp., 47 Ill.App. 699, 365 N.E.2d 66, 72 (1977) (Jiganti, J., dissenting).

The Utah Supreme Court in Zeese v. Siegel, 534 P.2d 85 (Utah 1975), recognized that the parties' course of conduct provides persuasive evidence of what the parties intended at the time a written contract was executed. In Zeese, the plaintiffs

brought an unlawful detainer action against the defendant to recover possession of certain real property. At the time, defendant was selling trailers and recreational vehicles on the premises. Plaintiffs originally leased the property to a third party for an initial term of 10 years with an option for an additional 10 years. Following a series of subleases, the property was assigned to Max Siegel. By terms of the lease, such an assignment was permissible without the consent of plaintiffs. Plaintiffs were promptly notified of the assignment to Mr. Siegel. Siegel took possession of the property in May, 1969, and later gave notice of the exercise of the option to renew the lease for an additional 10 years. Thereafter, plaintiffs visited the property on numerous occasions and observed defendant's business practices. Defendant continued to pay monthly lease payments of $200.00 through June, 1973 to plaintiffs. Until June, 1973, plaintiffs never gave defendant any notice that defendant was holding the premises as a month-to-month tenant or that plaintiffs considered defendant's use of the property to be in contravention of the lease's use covenant. In reliance on the validity of the assignment, defendant purchased various structures on the premises and made other improvements to the property.

Plaintiffs brought suit claiming that the defendant was a month-to-month tenant who had improperly refused to vacate the premises or in the alternative, that if the defendant had a valid leasehold interest, the interest was subject to forfeiture due to the defendant's breach of the use covenant in the lease agreement.

The trial court found the defendant's use of the premises did not violate the use covenant and that the assignment of the leasehold interest to defendant was valid. The court also found that the plaintiffs had waived and were estopped from asserting any defects either in the assignment or in the exercise of the option to renew. Plaintiffs appealed.

On appeal, plaintiffs contended that the trial court had erred in admitting parol evidence that supported a finding that the lease agreement was valid. In affirming the actions of the trial court, the Utah Supreme Court stated:

> [I]t is unnecessary for this court to construe [the use covenant] independently of the interpretation made by the parties to this action. Plaintiffs had had actual notice from the day defendant went into possession of the type of use being made of the premises. Although George Zeese was frequently upon the premises he never expressed an opinion that defendant's use was in violation of the covenant.
>
> Under the doctrine of practical construction, when a contract is ambiguous and the parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was. The parties, by their action and performance, have demonstrated what was their meaning and intent; the contract should be so enforced by the courts.

Id. at 89-90.

The affidavits of Norman Clark and William K. Reagan demonstrated that the parties understood and agreed that both the $100,000 per annum salary and the 1% gross sales compensation provisions were subject to unwritten conditions and terms. (R. 876-78, 881-84). Furthermore, the parties' undisputed course of

conduct contradicts the construction of the employment contract adopted by the trial court. This is such a case where "the parties, by their action and performance, have demonstrated what was their meaning and intent; [and] the contract should be so enforced by the courts." Id. at 90. At a minimum, genuine issues of material fact exist as to whether Webb waived his right to rely on the compensation provisions contained in the written contract.

Although the doctrine of estoppel is not expressly mentioned or relied upon in the Utah Supreme Court's rulings in Colonial Leasing Co., Union Bank, and Zeese, each of those cases supports the proposition that a party may be estopped from relying on the provisions of a written contract where certain contemporaneous understandings and representations were made with the intent of inducing another party to enter into a written contract. Under the doctrine of estoppel, a party to a contract may by his acts or conduct be prevented from denying in court the effect or results of those acts. Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (Utah 1970). Estoppel should be utilized by a court in order to prevent an injustice to a party who has, without fault, been deluded into a particular course of action by another. Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976).

The evidence submitted by R.O.A. in opposition to Webb's motion for partial summary judgment establishes that during the negotiations leading up to the execution of the written employment contract that the parties understood and agreed that Webb's salary

was to be paid in a combination of cash and trades, and that the 1% gross sales provision would not be paid to plaintiff unless R.O.A. had sufficient funds to make such payments. In reliance upon that understanding, the parties executed the written contract. Evidence supporting the defense of estoppel should have been submitted to the trier of fact for consideration.

CONCLUSION

Based upon the foregoing, defendants-appellants respectfully request that this Court reverse and remand this action to the trial court for a resolution of the genuine issues of material fact.

Dated this 14th day of August, 1989.

STRONG & HANNI

By _____
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Stephen J. Trayner
Attorneys for Defendants

DOUGLAS T. HALL
Attorney for Defendant-Appellant
R.O.A.

CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was hand delivered, this 14th day

of August, 1989, to the following:

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R8/APPBbc

ADDENDUM

RULE 56, UTAH RULES OF CIVIL PROCEDURE

* * *

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motions and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

* * *

(e) Form of affidavit; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary

judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

EMPLOYMENT AGREEMENT, made and effective on August 1, 1981, by and between R.O.A. GENERAL, INC., a Utah corporation, (hereinafter the "Employer" or "Company"), and ROLAND WEBB (hereinafter the "Employee").

1. Term. The term of employment shall commence on the 1st day of August, 1981 and shall continue until August 1, 1986.

2. Nature of Employment and Services. Employee shall be employed as Chairman of the Board and Vice President and agrees to provide such other duties as may be assigned to him by the Board of Directors.

3. Time Devoted to Employment. Employee agrees to use his best efforts, skill and experience in connection with his employment.

4. Compensation. As compensation for the services required to be performed by him hereunder, the Employee shall receive a basic salary of $100,000 per annum, payable monthly.

5. Additional Compensation. Employee shall be entitled to receive additional compensation annually equal to one percent (1%) of annual net sales of outdoor advertising of the Company.

6. Termination. The Employer may not terminate this Agreement for any reason other than fraud or gross malfeasance.

7. Death Benefits. If the Employee should die during the term of this Agreement, the Employer will pay the compensation the Employee would have been entitled to receive over any remaining term of the Agreement to the Employee's estate.

8. Records Upon Termination. Upon termination of this Employment Agreement, at the end of its term or otherwise, Employee agrees to promptly turn over all books, records, information, documents, customer lists, instructions and all other instruments pertaining to the business of Employer to Employer.

9. Non-Competition.

9.1 Employee acknowledges that continued employment by the Company will build an intangible asset of goodwill of value to the Company. In consideration of the employment of

Employee by the Company and of the performance by the Company of the other terms and conditions of this Agreement, Employee agrees that, during the term of this Agreement and for a period of five (5) years following the date of termination of this Agreement for any reason whatsoever, he will not knowingly, directly or indirectly, own, manage, operate, jointly control, lend money to, endorse the obligations of, or participate in or be connected with as an officer, employee, stockholder, partner, counselor, adviser, or otherwise, any business engaged to any extent in the outdoor advertising business nor will Employee solicit site leases or customers for such business: (a) within a fifty (50) mile radius of the present as well as any future office site where he performs or will perform services under this contract, or (b) within a fifty (50) mile radius of any outdoor advertising plant previously served by Employee in any capacity for the Company. Employee acknowledges that the remedy at law for any breach of this provision will be inadequate, and that the Company, or its assigns shall be entitled to injunctive relief should Employee breach this provision.

The parties intend that this covenant shall be construed as a series of separate covenants, one for each county encompassed within the area described. Except for geographic coverage, each such separate covenant shall be deemed identical in terms to the covenant contained in the preceding paragraph. If, in any judicial proceeding, a court shall refuse to enforce any of the separate covenants on the ground of unreasonable area, then this unenforceable covenant shall be deemed eliminated from these provisions for the purpose of those proceedings to the extent necessary to permit the remaining separate covenants to be enforced. If, in any judicial proceeding, a court shall refuse to enforce any of the separate covenants on the ground of unreasonable time, then the time of noncompetition shall be reduced to a reasonable time.

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Employee has carefully read the provisions of this paragraph and agrees that the time period and geographical area of restriction are fair and reasonable and are necessary for the protection of the Company's interests.

9.2 Employee agrees that upon termination of this Agreement for any reason whatsoever, Employee will not solicit any of the customers or site lessors of the outdoor advertising plant owned by the Company at the time of termination, nor will Employee offer to hire, or in fact employ or enter into any partnership, corporation or other business relationship, directly or indirectly, any of the employees, managers, or independent contractors of the Company for a period of five (5) years after termination of this Agreement. Employee acknowledges that the intangible asset of the goodwill of the Company and the outdoor advertising plant managed by Employee will be damaged significantly should such customers be solicited or employees hired by Employee, and, further, as an amount arrived at in good faith by both parties on the date of this Agreement and estimated to reasonably compensate the Company for the monetary loss which the Company sustains, Employee agrees to pay to the Company or its assigns Three Hundred Thousand and no/100 Dollars ($300,000.00) in the event of a breach of this covenant.

10. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon Employer and its successors and assigns, and upon Employee, and his heirs, beneficiaries, legatees and his executor or administrator.

11. Jurisdiction. This Agreement shall be governed by the laws of Utah.

EMPLOYER: R.O.A. GENERAL, INC.

By: _____

EMPLOYEE: _____

Roland Webb

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July 7, 1981

Mr. William Reagan
c/o Reagan Outdoor Advertising
Salt Lake City, Utah

Dear Bill:

This letter will constitute an amendment to my employment agreement with R.O.A. General, Inc. when that document is finalized, a copy of which is attached to this letter.

If you find the terms of this letter to be a satisfactory understanding of our modification of that employment agreement, as eventually executed in its present form, please sign the copy of this letter and return it to me for my files.

It is my understanding that I am entitled to receive, in addition to the compensation set forth in the employment agreement, two motor vehicles comparable in price and quality to the two vehicles which I am now provided, namely, a 1980 Pontiac Bonneville, and a 1979 Jeep Wagoneer Limited. In addition, in connection with the use of those automobiles, the company will reimburse me for any expenditures relating to automobile expense, including maintenance and repair. In the event of my death, it is my understanding that my estate could elect to continue the use of one such vehicle, and could elect to receive $500.00 cash each month in lieu of the other vehicle, and therefore, only maintenance and repairs would be required on the one retained vehicle.

With respect to my compensation while employed by the company, it is my understanding that any trades which are used by me for my personal use as opposed to business use will be charged to me at the rate of 50% of the face value of the trade, and will be reduction in the sums I am entitled to under the terms of the employment agreement.

Of course, it is also my expectation that the company will reimburse for any expenditures relating to conventions, business entertaining, liberal use of available tickets, normal clubs and other trade items which are made available to the company.

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I understand that I am to retain my present office space, and that the compensation which we have agreed upon for the five-year period is non-cancellable for any reason, including death, and that it has been calculated based on my providing services in the first through fifth year of approximately 50% of my time in the first year, and in each of the second through fifth years, the following respective percentages of my time: 25%, 12½%, 7½%, 5%.

With respect to the competition agreement in the employment agreement, you are aware that I am a majority stockholder in Palmer Outdoor Advertising, and of course that ownership is not considered to be competitive with the business of R.O.A. General, Inc., and that I am entitled to engage in business activities of that corporation outside the State of Utah.

With respect to your employment contract, a copy of which is also attached, we have also agreed that you will be entitled to the same types of benefits that I am, except that you will receive three automobiles and convention travel expenses for your wife, as well as miscellaneous club and other entertaining expenses.

We have also agreed that effective August 1, 1983, we would determine to what extent your father's salary could be justified at its present level of $24,000.00 a year, and to the extent that he was not rendering services of that value, then any sums which were not being earned would constitute a reduction in your compensation arrangement under your employment contract.

I look forward to a lengthy and profitable association with you.

Yours very truly,

ROLAND WEBB

TERMS ACCEPTED AND AGREED TO:

WILLIAM REAGAN

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